OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

9 November 2016

Supplementary submission on the New Zealand Intelligence and Security Bill

To the Foreign Affairs, Defence and Trade Committee

This supplementary submission from the Inspector-General of Intelligence and Security (IGIS) is informed by further consideration of the Bill and other submissions on it.

As with my primary submission, my interest is in whether the legislation clearly defines the powers of the intelligence and security agencies, their purposes and the controls on their exercise. I have paid particular attention to the accountability and oversight mechanisms in the Bill.

This supplementary submission comprises three tables:

- Table 1 sets out three additional recommendations arising from further consideration of the Bill;
- Table 2 identifies points made in others' submissions that I support;
- Table 3 comments on points made in other submissions that relate directly to the functions, powers and duties of the IGIS.

Overview

In addition to our primary submission, I recommend:

- amending cl 119(1) to refer to the agencies acting properly, or with propriety, as well as lawfully and effectively;
- amending cl 132 to require consultation with the IGIS as well as the Intelligence and Security Committee on appointments to the IGIS advisory panel;
- amending cl 142(a) and (b) to provide a power for the IGIS to require information that may be relevant to 'the exercise of the IG's functions under cl 121,' or words to that effect.

I support submissions from others that:

- the Bill should retain a definition of "national security"
- cl 11 should refer to the "objectives" of the intelligence and security agencies, not "principal objectives"
- cl 12(2), providing that the principles in 12(1) do not impose particular duties or powers on the agencies, should be deleted
- "public authority" should be defined
- cl 21 should be amended to provide a broader expression of political neutrality
- cls 99-101 on agency 'requests' for information should be deleted or substantially amended

- direct access agreements under cls 102-109 should include a reporting requirement
- cl 109, providing a power to amend Schedule 2 by Order in Council, should be deleted, or if retained should be amended as recommended by the Privacy Commissioner
- subcl 119(2) should be deleted to remove repetition of IGIS functions, with the exception of subcl 119(2)(iv) which should be added to the list of functions in cl 121
- cls 120 and 127 should be amended to require the Prime Minister to advise the House of the Intelligence and Security Committee's views on proposed IGIS and Deputy IGIS appointments
- cl 134 should be amended to give the IGIS discretion to consider complaints by non-NZ persons
- cl 143 should be amended to provide that common law and contractual obligations of secrecy or confidence do not override the duty to answer IGIS questions or give evidence to the IGIS
- cl 147 should be amended to provide that IGIS may forward any IGIS report to the Intelligence and Security Committee
- cls 153 and 185 should be amended to refer to "communicating"" Parliamentary proceedings
- cl 264 should be amended to apply all of the privacy principles to the intelligence agencies
- cl 7(5)(c) should be deleted from Schedule 3.

Table 1: Recommendations additional to primary submission

Clause(s)	*Submission*
119	119(1) states that the purpose of Part 6 (Oversight) "is to provide for … independent oversight … to ensure that [the] agencies are operating lawfully and effectively". It is a key feature of the oversight regime that it examines the actions of the agencies not just for lawfulness but for propriety. **I recommend** amending cl 119(1) to refer to the agencies acting properly, or with propriety, as well as lawfully and effectively.
132	This clause requires the Prime Minister to consult the Intelligence and Security Committee before recommending appointments to the advisory panel. **I recommend** amending cl 132 to require consultation with the IGIS as well as the Committee.
142	This clause provides that the Inspector-General may require any person to provide "(a) any information that the Inspector-General considers may be relevant to *an inquiry*; and (b) any documents or things in the possession or under the control of that person that the Inspector-General considers may be relevant to *an inquiry*" [emphasis added]. The functions of the IGIS under cl 121 include inquiries (121(1)(a)-(d)); dealing with complaints (121(1)(e)); reviews (121(1)(f) and (h); and unscheduled audits (121(1)(g). The Review recommended an update of "all legislative references permitting the IGIS to access information for the purpose of undertaking inquiries, to reflect all functions and duties of the role." Cabinet paper 2 supported this, noting that "undertaking inquiries is only one aspect of the IGIS's role … in terms of access to information, the legislation should accurately reflect all of the IGIS's functions and duties." **I recommend** amending cl 142(a) and (b) to provide a power to require information that may be relevant to 'the exercise of the IG's functions under s 121,' or words to that effect.

Table 2: Submissions supported

References to submissions are to [paragraph numbers] or (page numbers).

Submitter	*Cl(s)*	*Submission*	*Comment*
Multiple submitters	5	Retain a definition of "national security" in the Bill.	**Agree.** There are issues with the complexity and breadth of the definition in the Bill but this is not a reason to abandon any attempt at a definition. Such a key concept should not be left undefined.
Legislation Design and Advisory Committee [4.1] NZ Law Society [3.3]	11	Reference in cl 11 to the "principal objectives" of the intelligence and security agencies creates uncertainty by implying that there are additional, unstated objectives. The word "principal" should be deleted.	**Agree.**
Legislation Design and Advisory Committee [5.1]	12	Intention of 12(2), which provides that the principles in 12(1) do not impose particular duties or powers on the agencies, is unclear. It appears to strip subclause (1) of any legislative character and render it exhortatory. The statute would be strengthened without the limitation expressed in 12(2).	**Agree that 12(2) should be deleted** for the reasons given by the Committee.
Legislation Design and Advisory Committee [6.1] NZ Law Society [3.6]	13-15	"Public authority" should be defined, to increase the transparency of the legislation and the ability of the agencies to assist and advise under cls 13-15.	**Agree.**
Legislation Design and Advisory Committee [7.4]	16	Where an agency is to act under a Police warrant (to assist the Police), the relevant legislation should require the warrant application to state the intention to seek assistance from an agency.	**Agree.**

Submitter	*Cl(s)*	*Submission*	*Comment*
Legislation Design and Advisory Committee [9.1]	21	Amend cl 21 to provide updated expression of political neutrality that does not rely solely on "political party" as identifier of relevant political groups.	**Agree.** The Committee's suggested wording (with the exception of reference to "cause") is preferable to that in the Bill.
Privacy Commissioner [5.11] and others.	99-101	Remove or substantively amend cls 99-101 (Subpart 1 of Part 5).	**Agree.** I agree that these provisions will not help businesses manage the conflict between answering agency requests and meeting privacy obligations to customers. I would support an authorisation regime underpinning enforceable orders for business records, rather than requests.
NZ Law Society [5.7]	102-109	Direct access agreements should include a reporting requirement and the IGIS and Privacy Commissioner should be able to seek further information if required.	**Agree.** This could be added to the agencies' annual report requirements under cl 179(2). IGIS ability to seek information would be covered by cl 142 if amended as recommended above. Power for Privacy Commissioner to seek further information would seem to require new provision in Bill.
NZ Law Society [5.9]	109	The power in cl 109 to amend Schedule 2 (listing databases accessible to intelligence and security agencies) is unwarranted: it is a power for subordinate legislation to be used to amend primary legislation (a Henry VIII clause), which is strongly discouraged by LAC Guidelines. It would allow additional databases to be added to Sch 2 with significant implications for individual privacy. Power to amend Sch 2 should be left to Parliament [ie cl 109 should be deleted].	**Agree that cl 109 should be deleted** for the reasons given by the Law Society. If this is not accepted and cl 109 is retained, I support the safeguards proposed by the Privacy Commissioner (below).

Submitter	*Cl(s)*	*Submission*	*Comment*
Privacy Commissioner [5.31]	109	Minister should be required to consult the IGIS, Privacy Commissioner and the relevant agency providing access, in addition to the ISC, before recommending any amendment to Sch 2.	**Agree, *if* cl 109 is retained** (see above). LAC guidelines are that if Henry VIII clauses are required they should drafted in the most limited terms possible and be subject to adequate safeguards. Reasonable to consult the Privacy Commissioner as database access directly bears on privacy principles; the agency holding the data given the impact on its operations and responsibilities; the IGIS given that addition of a database potentially expands significantly the power of the relevant intelligence and security agency to acquire personal information without the need to seek a warrant.
Legislation Design and Advisory Committee [24.1]	119	Functions of IGIS are sufficiently set out in cl 121 and ref to functions in cl 119(2) is repetitive and creates ambiguity. 119(2)(a) should be amended to read "To achieve this purpose, the OIGIS is continued, with the IG having functions, duties and powers set out in this Part."	**Agree that IGIS functions should be fully expressed in one place, ie cl 121 – but If 119(2) is deleted, cl 119(2)(a)(iv) should inserted into cl 121.** The functions listed in 119(2)(a)(i)-(iii) are captured by cl 121; 119(2)(a)(i) also duplicates cl 119(1) as a statement of the purpose of the oversight provisions. Clauses 119(2)(a)(i)-(iii) can therefore be deleted without loss. Clause 119(2)(a)(iv), however, refers to an IGIS function to "advise the Government and the Intelligence and Security Committee on matters relating to oversight of the agencies". This is not duplicated in cl 121 but is a valid function for the IGIS. It should be retained, which can be achieved by adding it to the list of functions in cl 121.

Submitter	*Cl(s)*	*Submission*	*Comment*
Clerk of the House (7)	120, 127	The requirement for the Prime Minister to advise the House that the ISC has been consulted about a proposed appointment of an IGIS or Deputy IGIS should be replaced by a requirement to inform the House of the Committee's views.	**Agree**. The House should be advised whether the Committee supports the proposed appointment.
Legislation Design and Advisory Committee [27.1]	134	IGIS should have discretion to consider complaints by non-NZ persons – perhaps with specific provision for how immigration matters are to be dealt with (to avoid creating a *de facto* right of appeal) and with guidance for the exercise of IGIS discretion, eg requiring IGIS to have regard to whether considering a complaint is in New Zealand's interests.	**Agree**. As noted by the Independent Review [4.59] people who are not New Zealand persons can be affected by the agencies (eg people subject to recommendations by NZSIS regarding applications for visas, entry or residence permits) and might have complaints that merit investigation. Companies operating in NZ might also fail to qualify as NZ persons but have complaints of substance on matters of public interest. Cl 137 already gives the IGIS discretion to decline to inquire into a complaint. Rather than requiring a positive reason to inquire into a complaint by a foreign person, the Bill could add relevant grounds for declining to investigate a complaint by a foreign person – for example, if the IGIS is not satisfied that an inquiry is practicable (eg the complainant is not in NZ, or the inquiry would require access to information held outside NZ).

Submitter	*Cl(s)*	*Submission*	*Comment*
Legislation Design and Advisory Committee [28.1]	143	The duty to answer IGIS questions or give evidence to IGIS should override not just statutory obligations of secrecy but common law and contractual obligations of secrecy or confidence as well.	**Agree.** An example of where this could be relevant is IGIS scrutiny of the CORTEX programme. Under the Bill this will not longer require warrants, but will still be the subject of contractual arrangements with provisions for secrecy or confidentiality.
Clerk of the House (8)	147	Amend cl 147(4) to provide that IGIS may forward any IGIS report to the ISC if the IGIS considers that it is in the public interest to do so (instead of requiring the agreement of the responsible Minister or PM if the report is on an inquiry completed at the request of the Minister or PM).	**Agree.** This would be consistent with the ISC's importance in the oversight framework alongside IGIS, and with the shift in the Bill from Prime Ministerial to Parliamentary appointment (and hence accountability) of IGIS.
Clerk of the House (9)	153, 185	Replace ref to "broadcasting" Parliamentary proceedings with "communicating" proceedings (to reflect changes in terminology introduced by the Parliamentary Privilege Act 2014).	**Agree**.
Privacy Commissioner [5.35]	264	Apply all of the privacy principles to the intelligence agencies.	**Agree.**
Clerk of the House (9)	Sch 3	Remove cl 7(5)(c), which provides for the PM to decide that an IGIS or Deputy IGIS may not continue to hold office after expiry of their term (on the basis that such a power for the PM is inconsistent with Parliamentary control over appointment and removal).	**Agree**. As submitted by the Clerk, this provision simply enables continuity between office holders under normal circumstances.

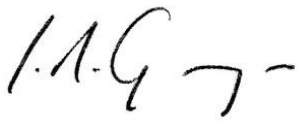
Table 3: Comments on other submissions directly relating to IGIS functions

Submitter	*Clause(s)*	*Submission*	*Comment*
Legislation Design and Advisory Committee [17.1]	Part 3	Authorisations to acquire assumed identities should be subject to regular IGIS review.	While such authorisations should be reviewable by IGIS, this is covered by the IGIS' review and audit powers under clause 121(f) and (g) and ability to initiate own-motion inquiries under clause 121(d).
Legislation Design and Advisory Committee [25.1]	121	Cl 121(1)(h) should be amended to provide that it is an IGIS function to conduct substantive review of warrants and authorised activities.	I are not sure this is necessary, but if there is a possibility of the scope of 121(1)(h) being read narrowly, an amendment to remove doubt should be considered. This might be as proposed by the Committee, or by expressly stating that the scope of any review is to be determined by the IGIS.
Privacy Commissioner [9.3]	124	Amend Bill to enable the Privacy Commissioner to consult the IGIS about any matters that come to the Commissioner's attention concerning the intelligence and security agencies.	No issue with the Commissioner's recommendation.
Legislation Design and Advisory Committee [26.2]	126	The Bill should specify what use may or may not be made of intelligence collected under an authorisation that the IGIS has found to be irregular.	Any such specification would have to reconcile with the provision in cl 126(1) that a finding of irregularity by the IGIS does not invalidate the authorisation or any agency action under it, or require the intelligence collected under the authorisation to be destroyed. The clause could provide expressly that the IGIS may, in addition to reporting any irregularity to the warranting authorities, recommend actions to be taken by those authorities or the agency concerned.
Matt Taylor	132	Recommendations for members of the advisory panel should be made by Parliament.	**Disagree**. Appointments to the panel do not require Parliament's attention.

Submitter	*Clause(s)*	*Submission*	*Comment*
Internet NZ (11)	134	A foreign-owned business operating in NZ that has a relationship with the intelligence and security agencies either through protective security roles or statutory obligations should be able to make a complaint to the IGIS – noting that a number of internet related companies in NZ would be unable to complain to the IGIS, including organisations that could be Critical National Infrastructure operators or Network Operators under the TICSA 2013.	Agree that in some circumstances non New Zealand persons should be able to make a complaint to IGIS – but prefer this be subject to discretion (as proposed by LADC – see above, Table 2).
Matt Taylor	147	All [IGIS] reports should be referred to the [Intelligence and Security] Committee.	I support a wider ability to refer reports to the Committee but prefer the suggestion of the Clerk of the House (see Table 2 above) that IGIS be enabled rather than required to forward any IGIS report. Not all reports will necessarily merit the Committee's attention.
Matt Taylor	148	IGIS "may advise" Minister should be "must"; and IGIS should also be required to report to the ISC (re a report requested by the Minister for the intelligence agency to which the report relates).	**Disagree**. IGIS should have discretion on what matters regarding agency responses to IGIS inquiries need to be brought to a Minister's attention, or to the attention of the ISC.
Matt Taylor	149	149(3): Minister "may provide" to the ISC his/her response to an IGIS report (on an inquiry *not* requested by the ISC) should be "must".	I suggest a Minister should have discretion on whether a ministerial response to an IGIS report needs to be brought to the ISC's attention. If the IGIS is able to refer a ministerially-requested report to ISC (see response to Clerk of the House submission on cl 147 in Table 2 above), a minister can take that into account in deciding whether to provide his or her response to the ISC.

Submitter	*Clause(s)*	*Submission*	*Comment*
Clerk of the House (9)	150	Amend cl 150 to state that the Minister responsible for the agency to which an IGIS report relates must present the report to the House (in addition to publishing on the IGIS website).	Not all reports will be of sufficient moment to merit presentation the House. Any published report can be tabled by any Member, including the Minister, if that is considered necessary.
Legislation Design and Advisory Committee [29.1] Matt Taylor	152	Consider whether it is appropriate for clause 152 to exempt IGIS proceedings, reports and findings from judicial review (Committee). Jurisdiction of courts over IGIS proceedings, reports or findings should not be limited (Matt Taylor).	**Disagree**. This clause replicates section 19(9) of the IGIS Act 1996. It permits review for lack of jurisdiction, so addresses the risk of significant error. The IGIS can only recommend, not determine, which limits need for access to judicial review. The same applies to the Ombudsman— see s 25 Ombudsmen Act 1975. The clause also avoids the difficulty of review proceedings involving classified information.
Gehan Gunesekara	267	Amend cl 267 to provide that employees of organisations that hold or have access to classified information may (under the Protected Disclosures Act) disclose to an Ombudsman classified information or information relating to the activities of an intelligence and security agency. (3)	**Disagree**. The Office of the IGIS is in a better position than the Office of the Ombudsman to assess 'whistleblower' disclosures relating to the intelligence and security agencies; it is also equipped and staffed to handle classified information to Top Secret level on a routine basis and the Office of the Ombudsman is not.

Thank you for your consideration.



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